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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 432

MORAND BROTHERS BEVERAGE CO., ET AL.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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STUART BERNSTEIN, and
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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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The petitioners herein, by Leo F. Tierney, Louis A. Kohn, Stuart Bernstein and Francis W. Collopy, their attorneys, pray that this Court grant rehearing of its order entered herein on December 7, 1953, denying the petition for a writ of certiorari.

In support of this petition, petitioners state that on December 2, 1953, subsequent to the filing herein of petitioners' Reply to Respondent's Brief in Opposition, the Court of Appeals for the Second Circuit (Judges L. Hand, Swan and A. N. Hand) announced its decision in *N. L. R. B.* v. *James Thompson & Co.*, No. 10, which decision did not come to the attention of petitioners until after the entry of the December 7, 1953 order herein. The

decision has not yet appeared in the Federal Reports.[1] This decision raises a direct conflict with the second opinion of the Court of Appeals for the Seventh Circuit in the instant case. (R. II-878.)

In the *Thompson* case, the Court reviewed a cease and desist, collective bargaining and reinstatement order of the Board. This order was based upon the Board's determination that the employer did not act in good faith when expressing doubt as to the union's majority status. A union organizer, after obtaining signatures of at least 40 of 72 employees on application cards, had notified the employer that the union represented a majority of its employees. The employer, through its superintendent, expressed its doubts, and in response to a union suggestion that the cards be checked by a disinterested person, or that an election be held by the State Mediation Board, replied that it would like to speak to the employees and thereupon called a meeting. A union meeting was called for the same hour as the employer meeting and a substantial majority of the employees ended up at the union meeting, out of which a strike was called. There was no factual dispute as to what was said by either the organizer or the superintendent at the time the doubt concerning the union's majority was expressed.

The Trial Examiner found that the superintendent had had bona fide doubt that the union had a majority. The Board reversed this finding, holding that the refusal to deal with the union upon receipt of notice of majority representation was not in "good faith."

The Court (per Judge Learned Hand) held that the issue of "good faith" was one on which the Trial Examiner's finding should have prevailed. Good faith, stated the Court, is a form of credibility. The Court pointed

1. It appears at 33 L. R. R. M. 2205 and Lab. Law Rep. ¶ 67,992.

out the difficulties inherent in any review of findings of a judicial officer "because the review does not bring up that part of the evidence that may have determined his choice." The Court pointed out that it had many times refused to upset findings of an Examiner affirmed by the Board "not because we felt satisfied that we should have come out the same way, had we seen the witnesses; but because we felt bound to allow for the possible cogency of the evidence the words do not preserve."

The Court then announced a general test for reviewing the findings of a Trial Examiner:

> "We do not see any rational escape from accepting a finding unless we can say that the corroboration of this lost evidence could not have been enough to satisfy any doubts raised by the words; and it must be owned that few findings will not survive such a test."

Thus, holds the Second Circuit, if the holding of the Trial Examiner can be supported by any reasonable inference, it cannot be reversed by the Board.

This holding is obviously in direct conflict with that of the Court of Appeals in the instant case. Here the Examiner made a finding that the "intent" of the petitioners was to temporarily sever the employment of their salesmen. The Board reversed that finding and found the "intent" to be to permanently sever the employment. The Court in reviewing that finding of the Board held that since it was not prepared to say that the evidence relied on by the *Board* was not substantial or adequate, the Board finding should not be set aside. (R. II-889.) This test resolves the "lost evidence" against the finding of the trier-of-facts; it proceeds as though the Board, not the Examiner, were the trier-of-facts.

"Intent" is no more a matter for the specialized knowledge of the Board than is "good faith." Both relate to

motive or state of mind; both are forms of credibility. These issues are for the trier-of-facts. Once they are determined the consequences may be matters for the Board's expertise, but the Board cannot be permitted to change the facts to force a result.

If the findings of a Trial Examiner on issues such as good faith and intent can be overruled by the Board with no greater intervention by reviewing courts than that exercised by the Court below, then findings of the Examiner may be ignored with impunity and fair trial will have been impeded.

Issues such as good faith and intent are of paramount significance in the whole area of labor relations. Acts are frequently lawful or unlawful not because they result in overt differences, but rather because of the motive which induces them. This was recognized recently by this Court in *N. L. R. B.* v. *Local Union No. 1229, IBEW*, No. 15, decided December 7, 1953, where the Court indicated that a discharge for insubordination, disobedience or disloyalty is lawful, but that if in fact such discharge is because of other concerted activities engaged in for the purpose of collective bargaining, it would not be lawful.

The conflict between the *Thompson* case and the instant case is clear. We submit that had the Second Circuit reviewed the instant case petitioners would not now find themselves faced with substantial liability for back pay to hundreds of employees whom they reinstated immediately upon cessation of the labor dispute. It is anomalous that a diametrically contrary result in another circuit should be countenanced.

We believe this irreconcilable conflict clearly calls for the exercise of certiorari jurisdiction by this Court in order to achieve the necessary uniformity in an important phase of the National Labor Relations Act. Moreover,

the conflict here presented affects every phase of administration and enforcement of the Act and is not limited to multi-employer bargaining. Until authoritatively determined by this Court there will be continuing confusion as to the respective functions of the Trial Examiner and the Board, uncertainty in the process of adjudication, and widespread litigation. An early and definitive ruling of this Court is therefore imperative in the interests of orderly and proper administration of the Act.

Conclusion.

Petitioners pray that this petition for rehearing be granted; and that, upon such rehearing, the petition for certiorari be granted.

Respectfully submitted,

LEO F. TIERNEY,
LOUIS A. KOHN,
STUART BERNSTEIN, and
FRANCIS W. COLLOPY,
Attorneys for Petitioners.

MAYER, MEYER, AUSTRIAN & PLATT,
Chicago, Illinois.

December 22, 1953.

CERTIFICATE OF COUNSEL.

Louis A. Kohn, one of the attorneys for Petitioners herein, certifies that this Petition is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

LOUIS A. KOHN.